IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No 1 of 2000

in

COMPANY PETITIONNo 134 of 1999

with

COMPANY APPLICATION No 2 of 2000

with

O.J. APPEAL No 5 of 2000

with

CIVIL APPLICATION No 2 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT
and
Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

TATA IRON AND STEEL COMPANY

Versus

MICRO FORGE (INDIA) LTD.

Appearance:

1. O.J.APPEAL No. 1 of 2000 & Company Application No.2/2000:

MR PC KAVINA for Petitioner
MR SN SOPARKAR for Respondent No. 1

2. O.J.Appeal No.5 of 2000 & Civil Application No.2/2000:

Mr SN SOPARKAR for the appellant
MR PC KAVINA for respondent No.1.

CORAM : MR.JUSTICE J.N.BHATT
and
MR.JUSTICE C.K.BUCH

Date of decision: 02/03/2000

ORAL JUDGEMENT (Per J.N.Bhatt, J.)

Admit. Service of notice is waived by learned advocate Mr S.N.Soparkar in O.J. Appeal No.1/2000 and learned advocate Mr Kavina in O.J.Appeal No.5/2000. In view of the facts and circumstances and at the request of the learned counsels appearing for the parties, both the appeals are ordered to be heard and disposed of finally, by this common judgment.

Whether the order of the learned Company Judge, exercising his powers under section 433(e) admitting and directing for advertisement in a winding up petition, at the instance of the original petitioning Company, Tata Iron and Steel Company Limited, is vulnerable, assailable, unreasonable and unjust or not? is the heart and substratum of this group of two appeals, wherein, common questions are involved against the common order, and upon request, they being disposed of by this common judgment.

Obviously, first it would prompt us to articulate and highlight the relevant and important factual aspects which have culminated into this group of two appeals.

FACTUAL MATRIX:

The Tata Iron and Steel Company Limited, by filing

Company Petition No.134/99 for winding up of Micro Forge (India) Ltd., inter alia, contending that it has become monetarily unable to pay the debts due to Tata Company, arising out of the breach of agreement of sale of 1500 M.T. Non-Alloy steel billets. This was the gist of the controversy between the parties. The Tata Company is the original petitioning Company, whereas, the Micro Forge Company is the respondent Company. They are, hereinafter, referred to, for the sake of convenience, and brevity as they were before the Company Court. The impugned order, whereby, the winding up petition came to be admitted along with the direction of publication of advertisement is questioned by both the original petitioner and the original respondent. The petitioning Company has filed O.J. Appeal No.1/2000 for the limited challenge against the rejection of its request for appointment of provisional liquidator during the pendency of the winding up petition after admission, whereas, OJ Appeal No.5/2000 is filed by the original respondent Micro Forge Company. Needless to reiterate that both the appeals arise out of one common order of the learned Company Judge recorded, on 22.12.99, in Company Petition No.134/99.

By virtue of an agreement, dated 20.6.95, original petitioner and the original respondent companies agreed for sale of 1500 metric tons Non-Alloy steel billets at Rs.8420/- per metric ton CIF LO Kandla on High Seas sales basis, as per the version of the Tata Company. The goods were being carried on in the ship M.V.Stavros Kapetan, at the time when the sale took place. Incidentally, it may be mentioned that there was one more agreement between the parties with regard to consultancy and service charges, which, of course, would not figure in the controversy between the parties in these appeals. It is the further case of the Tata Company that as per the original contract the terms of payment were that the Company would open an Irrevocable Letter of Credit for 150 days in favour of the petitioning Company for the price of the goods.

As per the case of the original petitioner, the respondent Company failed to open the Letter of Credit in favour of the petitioning Company, but as per the terms of High Seas sale the property in the goods passed to the Company while the goods were still, at sea. On 19.7.95, Micro Forge Company wrote to the Tata Company requesting to accept post dated cheques as the respondent Company was finding it difficult to obtain Letter of Credit from the bankers, and in consequence thereof, two cheques came to be presented to the Tata Company with communication,

dated 1.8.95 towards consideration for the purchase of billets. Those cheques, of course, were undated and were handed over to Tata Company in lieu of the Letter of Credit, which was likely to be sanctioned and after which the cheques were to be returned to the respondent Micro Forge Company.

It has, also, been alleged by the Tata Company that upon arrival of the ship in question at Kandla Port, the goods were off-loaded on 20.7.95 by handling agents and transported to the business premises of the respondent Company, at Rajkot, between 14th and 17th August, 1995. The bills of entry of the goods into India were dated 9.8.95.

Thereafter, detailed exchange of correspondence took place and in course of that period, as per the case of the Tata Company by a fax message, dated 15.11.95, the Company requested the petitioner not to deposit cheques as demand draft was proposed to be sent on that day and further payment was to be sent, on 20.11.95, and balance payment would be cleared by 15.12.95. The respondent Micro Forge Company, accordingly, paid Rs.55 lacs by the aforesaid demand drafts by the end of November, 1995.

After requesting the petitioner Company not to present the post dated cheques, the respondent Company got a schedule of payment regarding outstanding payment against the purchase of billets promising to pay Rs.70 lacs by 31.1.96. The Company could not honour and clear the payment but assured for the same, by April, 1996. Again promise was given by the letter, dated 20.8.96, to clear the outstanding dues by September, 1996, and again by letter, dated 8.10.96, the company sought time to make the payment. Thus, there was exchange of schedule for the payment between the parties.

Upon failure to honour the outstanding dues, the petitioner Company gave a statutory notice, dated 17.3.99, demanding due payment towards principal amount for the value of the goods supplied with interest at the rate of 24 per cent per annum, from 6.6.95, amounting to Rs.69,99,824/-. The Micro Forge Company neither replied nor complied with the notice, as a result of which, the Tata Company, was led to file the the company petition for winding up under section 433(e) of the Act in May, 1999.

THE VERSION AND DEFENCE OF THE RESPONDENT COMPANY, MICRO FORGE.

The respondent Micro Forge Company has raised various contentions against the winding petition, which will be highlighted hereinbelow :--

(1) That the Company had written a letter, on 5.8.95, to Tata Company and in reply to which the Tata Company sent a fax message. The letter dated 5.8.95 and the fax reply dated 7.8.95 are produced.

(2) That the petitioner Tata Company was informed by letter, dated 4.8.95, that it has paid duty of Rs.49,10,406.40 ps. and also clearing agency charges of Rs.1,50,000/- on behalf of petitioner Tata Company. In that the defence is that both the Companies had agreed to change the nature of contract from High seas sale to Ex-Kandla sale and, therefore, the customs duty and other expenses which were previously liable to be paid by the respondent Company were subsequently agreed to be paid by the Company on behalf of the petitioner Tata Company.

(3) That the petitioner Tata Company is bound to pay an amount of Rs.7,00,000/- and also an amount of Rs.50 lacs and odd paid towards duty and expenses was to be adjusted against the goods to be supplied by the petitioner Tata Company and that on account of non-supply of such goods, the Company was put at a loss as the price of such goods had gone up in the meantime to the extent of Rs.64 lacs.

(4) That the respondent Company is a profit making and ongoing company and it has more than 5000 shareholders and 105 employees.

In short, the ground of winding up of the respondent Micro Forge Company on the basis of inability to pay the debts came to be challenged and the respondent company raised a counter claim. The claim made by the petitioner Tata Company not only came to be, seriously, disputed by the respondent Micro Forge Company but it has also contended that the petitioning Company is bound to pay a substantial amount running into lacs of rupees by way of set-off.

The learned Company Judge, after having heard the learned counsels appearing for the parties and considering the pleadings and the documentary evidence and the proposition of law relied on by the parties found that

there was a fit case for admission of the matter, in view of the provisions of section 433(e) of the Companies Act, 1956. Therefore, the petition came to be admitted by the order, dated 22.12.99. The advertisement of notice of admission of petition was directed to be published in two leading daily newspapers after 31st January, 2000. The impugned order also restrained the respondent Company from disposing of or transferring or parting with the possession of its assets other than finished goods in the nature of stock-in-trade, while deferring the request for appointment of a provisional liquidator, in respect of the assets of the respondent Micro Forge Company. That is how both the Companies have now come up before us in this group of two appeals against the order of the learned Company Judge.

We have, dispassionately, heard the learned counsels appearing for the parties. We have also examined, threadbare, the documentary evidence relied on by the parties and considered by the learned Company Judge. We have also been taken through the relevant case law, to which reference will be made by us as and when required, at an appropriate stage, hereinafter.

Before we embark upon the evaluation of the facts and the rival submissions raised before us at, a marathon length, we would like to highlight the concept and philosophy of the winding up of the Companies and the statutory setting prescribed in the Companies Act, 1956. Part VII of the Companies Act, 1956 deals with the provisions of winding up, whereas, in Chapter I of this part deals with the modes of winding up. Section 425 prescribes modes of winding up as per which a company can be wound up either by the Court or voluntary or subject to the supervision of the Court. Section 426 prescribes the liability as contributories of present and past members, in the event of a company being wound up. In sections 427 to 432, different provisions are made in relation to the status, the liability extent and the monetary accountability of contributories to which we are not very much concerned in so far as the merits of the present group of two appeals are concerned.

Next it would take us to Chapter II in Part VII, which pertains to winding up by the Court. Cases in which a Company may be wound up by the Court is, statutorily, prescribed in section 433 indicating the circumstances in which the Company may be wound up by the Court. Section 433 provides six aspects and circumstances under which the Court is empowered to wind up the Company. Section 433 reads as under:

"433. A company may be wound up by the Court --

(a) if the company has, by special resolution, resolved that the company be wound up by the Court;

(b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;

(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(d) if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two;

(e) if the company is unable to pay its debts;

(f) if the Court is of opinion that it is just and equitable that the company should be wound up."

We are, at present, in this group of appeals, vitally, concerned with the provisions of clause (e) of section 433, which, provides that the Company Court is empowered to pass an order of winding up if the Company is found unable to pay its debts. This provision is required to be appreciated, evaluated and examined in the light of the factual scenario emerging from the record of the case and the relevant legal settings.

It cannot be gainsaid, that winding up of a company is a process in which the life span of it, is cut short and its property administered for the benefit of its creditors, contributories and the shareholders-members by the competent person to be appointed by the Court. Winding up of a company differs from the insolvency of an individual, inasmuch as a company cannot be made insolvent under the Insolvency Law in India unlike in United Kingdom. Moreover, even a solvent company may be wound up and administered or a liquidator could be appointed by the competent court who takes charge of the Company and the company remains under his control. He collects its assets and dues and pays the debts and liabilities and finally distributes any surplus amongst

its members in accordance with the respective legal rights of the concerned parties. This is highlighted to show that once an order of winding up is recorded by the competent Court on any one of the grounds enumerated in section 433 of the Companies Act, the outcome would be like death of an individual. Once winding up order is passed, the entire managerial functioning and decision making authority is shifted and, ordinarily, entrusted to the Official Liquidator or an administrator. No doubt, the impugned order radiates an imprint of only an admission of winding up petition and directing the publication of the advertisement in leading daily newspapers. It, also, cannot be gainsaid that an order of admitting a winding up petition and the resultant order for the publication of an advertisement inviting claims from respective parties by a public notice is, in many cases, from commercial point of view, business point of view, from marketability point of view, no less injurious than winding up. This proposition could, hardly, be questioned.

The parameters prescribed or propounded by process of evolution of case law, in order to reach to the conclusion of a fit and appropriate case for declaring a company fit for winding up are also very sell settled, extensively explored by catena of judicial pronouncements. The expression in section 433 (e) "inability to pay its debts" is required to be considered and examined taking into account various aspects. It may also, be mentioned, at this stage, that a claim of order of winding up is not a matter of right, but it is the discretion of the Court on one or more of the grounds having been established as mentioned in section 433 of the Companies Act. Even, at the stage of admitting the petition, unlike other petitions, the Company Court has to be very alive to the relevant aspects and is oblige to consider many circumstances.

Certain important chronicles and contours to be kept in the mental radar, before reaching to the conclusion in a winding up petition, can be articulated, as under:

(1) The remedy under section 433 in general and under clause (e) in particular is not a matter of right, as such, and it is the discretion of the Company Court. It does not confer any right on any persons to seek order that the company should be wound up. It is a provision empowering the court by a statutory provision to pass order of winding up in an appropriate case.

(2) Merely because any one of the circumstances enumerated in section 433 of the Companies Act, exists, the Court is not bound to order winding up of the company. Nobody can aspire to wind up the company as a matter of course. The Court has wide power and discretion. In this connection, inability to pay debts, is required to be judged from various set of facts and circumstances. It may also be stated that inability to pay debts in all cases, ipso facto, could not be construed as an appropriate case for winding up.

(3) The debt is a money which is payable or will be payable in future by reason of peson's obligation. The expression 'debt' would refer the liability to pay and it rests on certain contingencies, conditions and casualties. Even if the debt is proved and even if the inability to pay the debt is also shown, it is not a launching pad, in all cases, for successful winding up order. Inability may arise for variety of reasons and the Court is obliged to consider whether inability is the outcome of any deliberate or designed action or mere temporary shock and effect of economy and market. In a given case, it may happen that a party may become unable to pay its debts for a while, but that by itself is not a criterion for exercise the power to wind up, ipso facto.

(4) It is necessary for the Company Court to consider the financial status, strength and substratum of the Company, in overall context. It is possible, at times, there may be a cash crunch. It may be also, possible, at times, the temporary cash crisis despite high sale and heavy turnover and, therefore, in such a situation, mere disability or only on the ground of inability to pay would not constitute a ground empowering the Court to wind up the Company.

(5) If the Company is an ongoing concern having regular business and employment of employees, the Court cannot remain oblivious to this aspect. The effect of winding up would be of putting an end of the business or an industry or an entrepreneurship and, in turn, resulting into loss of employment to the several employees and loss of production and effect on the larger interest of the society.

(6) Even dividend declared by the company regularly and having profit in the light of the profit and loss account, though temporarily, there may be inability to pay the debt or in case of any eventuality, the company is unable to make the payment of dues and that by itself could not be construed as a ground to winding it up.

(7) Winding up of a company, as such, is nothing but a commercial death or insolvency and, therefore, the Company Court is obliged to take into consideration not only the temporary inability, or disability to make the payment of debts, but the entire status and position of the company in the market.

(8) When grounds on which the winding up order can be denied, upon an evaluation of the facts of the case, after admission, exists from the record already placed before the Court, it would be a sound exercise of discretion to reject the petition instead of admitting it. This view is very much celebrated.

(9) Inability to pay debts in terms of section 433(e) read with section 434(1)(a), demand of the debt would raise a presumption as to inability to pay its debts. But such a presumption is rebuttable. Such a presumption may be rebutted on existing material and what evidence is sufficient depends on the facts and circumstances of the case.

(10) If the Company has shown considerable growth in a reasonable span and is a growth oriented enterprise, even in case of temporary inability would not be sufficient to drive it to wind up.

(11) Though, ordinarily, an unpaid creditor may aspire for an order of winding up, then 'ex debito justitiae' rule is not of inflexible mandate, but is, as such a matter of discretion of the Court.

(12) Section 433 is also indicative of the fact that even if one or more grounds mentioned in section 433 exist, it is not obligatory for the Court to make an order of winding up. The court has discretionary power. The Court must in each case exercise its discretion in deciding whether in the circumstances of the case, it would be in the interest of justice to wind up the company. It

is a well known rule of prudence that even in case where indebtedness to the petitioning person is undisputed, the Court does not pass order for winding up where it is satisfied that it would not be in the larger interest of justice to wind up the Company.

(13) It is, also, well settled that a winding up order shall not be made on a creditor's petition, if it would not benefit him or the company's creditors in general.

(14) The Court is also obliged to consider that it would be in the interest of justice to give the Company some time to come out of the momentary financial crisis or any other temporary difficulty as winding up is a measure of last resort.

(15) Winding up course cannot be adopted as a recourse to recovery of the debt

(16) The Court must bear in mind one more celebrated principle and consider whether the Company has reached a stage where it is obviously and plainly and commercially insolvent, that is to say, that its assets are such and its existing liabilities are such as to make the Court feel clearly satisfied that currents assets would be insufficient to meet the current liabilities, along with other principles.

(17) It is also necessary to consider whether the respondent Company has become defunct or has closed its business for quite some time, whether it is commercially insolvent. For the purpose of finding commercial insolvency, a mere look into the financial data is relevant to examine about its soundness. In all matters relating to winding up, the Court may have regard to the wishes of the creditors and contributories and may, if necessary, ascertain their wishes appropriately. If the Company is solvent, the wishes of the contributories would carry more weight as they are persons, mainly, interested in the assets.

(18) The element of public policy in regard to commercial morality has, likewise, to be taken into account before determining the winding up issue. The Court has also to consider the

purpose and policy behind section 443 and 557 of the Companies Act.

(19) Winding up is the last thing the Court would do and not the first thing to do having regard to its impact and consequences. Winding up of a company would ensue :

(a) closing down of a company which is engaged in production or manufacture or which provides some services;

(b) it would throw out of employment numerous persons and result in gross hardship to the members of families of the employees;

(c) loss of revenue to the State by way of collection of taxes which other wise should have been collected, on account of customs, excise duties, sale tax, income tax etc.

(d) scarcity of goods and diminishing of employment opportunities.

(20) Winding up petition has to be submitted in prescribed form highlighting all the facts and emphasizing the inability of the Company to pay its debts. The form prescribed under the Company Court Rules, clearly, indicate that the petitioner should provide all necessary material particulars. The petitioner is obliged to show that the financial status or the monetary substratum or the commercial viability of the Company has gone so low and down that winding up is obviously, and evidently, unavoidable.

(21) It is a settled proposition of law that winding up petition is not a legitimate means of seeking to enforce the payment of debt which is disputed by the company, bonafide. Winding up petition ought not to be aimed at pressurising the company to pay the money. Such an attempt would be nothing but would tantamount to blackmailing or stigmatizing the concerned company by abusing the process of the Court.

(22) Winding up petition is not an appropriate mode enforcing bonafide disputed debts as it is nothing but misuse and abuse of the process of

the Court.

(23) Winding up petition is not an alternative form for resolving the debt dispute. In certain cases disputes are such that they are fit for resolving through civil court rather than through company court.

(24) What is bonafide and what is not is a question of fact. The expression 'bonafide' would mean genuine, in good faith and when dispute is based on substantial grounds or when defence is probable and with some substance, it is a bonafide dispute. It must be strictly noted that winding up petition is not an alternate to civil suit.

In the light of the above position, let us examine the financial position of the original respondent Micro Forge Company from the documents placed on record of the last three years and summarised in a letter. In our opinion, it would be just and proper to reproduce the same to understand the financial status of the respondent Company of last 3 years. It is as per the audited balance sheet, about which there is no dispute. It is as follows:

(Rs. in lacs)			
Particulars	1996-97	1997-98	1998-99
Turnover			
Domestic	555.77	923.12	882.90
Export	496.84	176.33	352.92
Total	1052.61	1099.45	1239.82
Profit before Depreciation	104.06	90.49	94.22
Depreciation	41.62	43.00	43.32
Profit after tax	62.44	47.48	45.57
Share Capital	560.87	560.87	560.87
Reserve and Surplus	378.11	425.60	471.17
Secured Loans	718.51	763.51	705.35
Gross Block	833.19	899.74	935.18
Net Block	729.11	752.67	744.78
Net Current Assets	818.33	889.17	913.42

A mere glance through the aforesaid figures would lead to

an irresistible conclusion that the profitability of the company, in substance, is good and very well maintained. A mere change of two to three lacs in profit after tax is of no any consequence. Even the profit after tax, in our opinion, could be rated, as good. In short, bearing in mind the overall picture emerging from the aforesaid particulars of financial figures, the profitability, the turnover, the reserves and surpluses and the soundness of the entrepreneurship could, hardly, be questioned. This aspect, in our opinion, with due respect to the learned Company Judge, has not been properly evaluated and perceived. Not only that, what will be the effect of the resultant unemployment of 105 employees, which is not in dispute, appears to have not been placed before the learned Company Judge. In our opinion, the impugned order does not deal with in detail the aforesaid factors, which we have highlighted, which we are obliged to consider before passing an order for admission.

It is, also, a settled proposition of law that in a case of disputed debt or a disputed question of fact, the Company Court would raise its hands and it would be for the parties to get the disputes adjudicated in a competent Civil Court as it requires leading of evidence, documentary, as well as oral, and appreciation of the same, which is the domain of the original civil court. In our opinion, there are many disputed questions of facts, in the present case, apart from the fact that the debt itself is disputed.

Our attention was also drawn to the observations of the learned Company Judge made in para 8 by learned counsel Mr Soparkar, which read as under:

> "8. It is true that ordinarily such disputed questions of fact would be required to be adjudicated upon in a civil suit when the parties would be leading documentary as well as oral evidence and also because Deepayan Mohanty has not filed any affidavit to controvert his authorship of the fax letter purporting to be dated 7.8.1995 (Annexure II) from the petitioner to the Company, though Dilip S. Kumar, Area Sales Manager of the petitioner, has stated in para 4 of the rejoinder that the fax message was shown to Deepayan Mohanty and he has denied his signature as also the sending of such letter to the respondent."

It can be, very well, visualised from the above observations that the proposition of law and,

observations that the proposition of law that requiring investigation of facts and examination of witnesses and documents, it would be advisable for the parties to go the Civil Court is the accepted proposition.

The serious controversy is about the liability for payment of duty. Both the companies have divergent pleas. Whether it was a High-sea sale or Ex-Kandla sale, is, also, in dispute. The version of the petitioning Company is that the contract was on the basis of High-sea sale, whereas, the contention of the respondent Company is that the contract was of Ex-Kandla sale and, therefore, liability for payment of customs duty is very much in dispute. In this connection, letters have been exchanged and since it is a disputed question of fact, it could be resolved before a competent forum or a civil court and not, at least, before the Company Court. In our opinion, this aspect ought to have weighed much with the Company Court. Apart from the dispute of debt, there are other disputed questions, like whether it was High-sea sale or Ex Kandla Sale and such other aspects.

Our attention is also invited to the observations made in para 10.1 of the impugned order quoting passage from the Palmer's Company Precedents, Pat II, 1960, which reads as under:

"In Palmer's Company Precedents, Part II, 1960 Edn., at page 25, the following passage appears:

> A winding up petition is a perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution which the Court gives to a creditor against a Company unable to pay its debts."

The aforesaid paragraph relied on by the learned Company is judge is also, seriously, criticised and it is contended that the observations have not been read textually and contextually in proper prospective and it is not relevant in the light of the facts and circumstances of the present case, whereas, in respect of the observations made in para 10.2, it has been, seriously, submitted that the proposition of law laid down in "Pradeshiya Industrial & Investment Corpn. of UP v. North India Petrochemicals Ltd., (1994) 3 SCC 342, is not, correctly, appreciated, and in support thereof, it is contended that the observations made in the penultimate para of the said decision are very weighty and important, which reads as under:

"We are informed that the financial position of the appellant is sound. It is the largest financial corporation of the State of Uttar Pradesh, it has rendered financial assistance of Rs.1,024.83 crores till March, 1992, to more than 100 industrial units and has also promoted joint sector projects. It is a profit-making financial corporation and is paying dividend as seen from the balance-sheet for the years 1991-92 (filed along with special leave petition). The assets of the appellant-corporation are Rs.5,26,35,36,568. The reserves are Rs.17,60,15,222. The profit earned by the appellant before payment of tax is Rs.7.40 crores and after meeting its financial liabilities, Rs.2.78 crores."

It was, therefore, submitted that in the light of the facts and circumstances, as in the present case, in that case also it was found that there was no justification whatsoever for admitting the winding up petition and accordingly, the winding up order was quashed and set aside. We find much substance in the aforesaid contention.

In the light of the aforesaid facts and circumstances of the present case, we have not been able to convince ourselves to uphold the finding that the dispute raised by the respondent Company or the defence propounded by it is dishonest or malafide. In the circumstances, when bonafide dispute of debt is raised, it is not the Company Court but the competent civil Court which should adjudicate the controversy as an original court after undergoing full-fledged trial.

There is nothing on record to even, remotely, indicate that the dispute propounded about the liability and the nature of contract, whether it was high-sea sale or Ex Kandla sale was not a bonafide dispute, more so, when a copy of the fax message is relied on by the respondent Company and the author Shri Deepayan Mohanty, one of the officers of the Tata Company, at the relevant time, has not filed an affidavit. The ground raised by the petitioning Company is that the said officer is not in the employment and therefore affidavit could not be filed. Whether the dispute raised by one company is right or not is not the question to be considered by us, at this stage. Prima facie, we are required to consider as to whether such a dispute raised is genuine and bonafide or is dishonest and malafide. We have not been

able to uphold the contention that such a dispute raised by the respondent Micro Forge Company is in any way malafide or dishonest.

Bonafide dispute over debt is a question depending upon the factual scenario of a given case. Where there is a bonafide dispute, the company cannot be said to have neglected to pay on a statutory demand. In Palmer's Company Law, 24th Edition, at page 1366, it has been clearly observed that a petition for winding up with a view to enforcing payment of a disputed debt is an abuse of process of the Court and should be dismissed with costs. This principle is, succinctly, established in following English Cases.

1. Imperial Silver Quarries (1868) 14 W.R. 1220;

2. Re Kings Cros Industrial Dwellings Co. (1870) L.R. 11 Eq. 149;

3. Re London & Paris Banking Corp. (1875) L.R. 19 Eq. 444, 446;

4. Cadiz Waterworks Co. v. Barnett, (1875) L.R. 19 Eq. 182;

5. Cercle Restaurant Castiglione Co. v Lavery (1881) 18 Ch. D. 555;

6. Re The Imperial Hydropathic Hotel Co. (1882) 49 L.T. 147;

7. Re K.L.Tractors Ltd. (1954) V.L.R. 505;

8. Bryanston Finance Ltd. v. de Vries (No.2) (1976) Ch. 63 (C.A.)

9. Re Claybridge Shipping Co. S.A. the Times, March 14, 1981 (C.A.); (1981) C.A.T. 143.

To fall within the general principle, the controversy, really, must be bonafide in both, subjective and objective sense. This means that, it must be, honestly, believed to exist and must be based on substantial or reasonable grounds. 'Substantial' means having substance and not frivolous or vexatious and which the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. It must also be remembered that the onus is on the company to bring forward a prima facie case, which satisfies the court

that there is something which ought to be tried either before the Court, itself or in an action or by some other proceedings.

There are various factors and facets, contours and chronicles emerging from the facts of the case requiring consideration before adjudicating upon the plea of winding up by the Court. When the petitioner is forcing payment of debt, which it knows to be in substantial dispute the evidence may support an action by the company against the petitioner for the tort of malicious prosecution. No monetary loss or special damage to the company need be proved for the presentation of the petition is, from its very nature, calculated to injure the credit of the company. It will be interesting to refer to a decision in A - Company (No.003729 of 1982), (1984) 1 W.L.R. 1090, that even in a case where the company in good faith and on substantial grounds disputed the debt and could not know the sum due but was willing to pay a lesser amount, its omission to pay either the statutory demand or the lesser amount did not constitute 'neglect' within the meaning of section 123(1)(1) of the Insolvency Act, 1986, which is applicable in case of an issue of winding up of a company in England and Wales.

In a recent decision in "Re-Bayoil SA Seawind Tankers Corp. v. Bayoil SA, reported in (1999) 1 All ER page 374, the proposition of law is, again, very well expounded and propounded in case of compulsory winding up. It was decided on 31st July, 1998. It has been held in the said case that when a Company had a genuine and serious cross-claim which it had been unable to litigate, the Court should, in the absence of special circumstances, dismiss or stay the winding up petition in exercise of its discretion under section 125(1) of the Insolvency Act, 1986. In that case, the cross-claim was genuine and serious, it was one which the company was unable to litigate and it exceeded the amount of the petitioner's debt. The fact that no appeal lay in relation to the interim award that the company's P & I club had granted security for the company's claim and that there was no real evidence that the award could be paid did not amount to special circumstances which made it inappropriate for the petitioner to be dismissed or stayed. The appeal was, accordingly, allowed and winding-up order came to be discharged. Similarly, for dismissal of winding up petition where the company has a genuine defence or dispute or a cross-claim, it has been observed in Halsbury's Laws (4th edn) (1996 reissue) para 2212. 4 Halsbury's Statutes (4th edn) (1998 reprint) 821 succinctly propounds the winding up issue in similar

cases when discretion is sought to be exercised under section 125 of the Insolvency Act, 1986.

The pith and substance of the observations made in the Halsbury's Laws, in this connection, could be highlighted in following terms:

A petition founded on a debt which is disputed in good faith and on substantial grounds is demurrable for the reason that the petitioner is not a creditor of the company within the meaning of section 224(1) at all and the question whether he is or is not a creditor of the company is not appropriate for adjudication in winding up proceedings. In fact, in such a situation, the dismissal of the petition is not at any rate, initially, a matter of discretion of the court. It is founded on the petitioner's inability to establish the locus standi to present a petition under what is now section 124(1) of the Insolvency Act, 1986. The case of an undisputed debt with a genuine and serious cross-claim is different, in that the dismissal or staying of the petition can only be a matter for the discretion of the court, albeit that its exercise may have been narrowed by authority. So, there may be two categories of cases, one disputed debt category and another cross-claim case category.

In the present case, there is a bonafide dispute of debt and also substantial dispute of counter claim. The principles, which we have enunciated hereinabove, are extensively, explored in catena of judicial pronouncements. For short, we cannot resist the temptation of referring the following decided cases:

1. Madhusudan Gordhandas & Co. v. Madhu Woolen Industries Pvt. Ltd, (1972) 42 Company Cases, 125 (SC), wherein, it is held that one act of dishonesty on the part of the petitioner is sufficient for rejection of petition.

2. Harinagar Sugar Mills v. Court Receiver, H.C.Bombay, AIR 1966 SC 1707, wherein it has been observed, relying on Palmer's Company Precedents that a winding up order is not a normal alternative.

3. Pradeshiya Industrial & Investment Corporation v. North India Petrochemicals Ltd., (1994)3 SCC 348, wherein it is held that mere inability to pay debt without any other evidence itself is not always sufficient to exercise discretion in favour of the petitioner.

4. American Express Bank Ltd. v. Core Health Care Ltd., (1999) 96 Company Cases, 841, wherein, this Court (Coram: R.Balia, J.) has, lucidly, propounded the material principles and important parameters to be considered by the Court before adjudicating and exercising discretionary powers under section 433 of the Companies Act, 1956.

5. Ashok Fashions v. Magdoot Acid & Chemicals,(Guj) (1998) 91 Company Cases, 655. Dealing with the procedural part, also, as required under the Company Court Rules, 1959, pertaining to winding up has laid down certain principles. What is the requirement for being stated in the petition under rule 95 in case of Creditors petition prescribed requirements under forms No.45, 46 and 47 are dealt with. It is held that if the petition does not diclose the financial status of the respondent Company, which is mandatory in case of a petition by the creditor, and therefore, petition came to be dismissed on that ground.

In the light of the facts and circumstances enumerated hereinbefore and the submissions coupled with the relevant proposition of law, in our opinion, the order of admission for winding up petition and the resultant directions are not warranted and justified. They are, therefore, required to be quashed.

In the result, O.J.Appeal No.1 of 2000 is dismissed and O.J. Appeal No.5 of 2000 is allowed and the order passed by the learned Company Judge is quashed and set aside. In the facts and circumstances, we do not deem it necessary to to pass any order for costs.

In view of the order passed in OJ Appeals, no any order, in Company Application No.2 of 2000 and Civil Application No.2 of 2000, is required. Hence they are dismissed.

At this stage, learned counsel Mr Kavina, appearing for the petitioning company has requested for continuance of the interim order with regard to restraining the respondent company from disposing of, transferring or parting with the possession of the assets of the respondent company so as enable the petitioning company to avail further remedy. In the facts of the case, the request is accepted, with the result, the order recorded by the learned Company Judge with regard to restraining the company from disposing of transferring or parting

with the possession etc. shall stand extended for a period of 10 weeks from today.

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(vjn)